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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE HIGH-TECH EMPLOYEE ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL ACTIONS

Master Docket No. 11-CV-2509 LHK

DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO STRIKE THE IMPROPER REBUTTAL TESTIMONY IN DR. LEAMER'S REPLY EXPERT REPORT OR, IN THE ALTERNATIVE, FOR LEAVE TO SUBMIT A REPLY REPORT OF DR. STIROH; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date:	March 20, 2014 and March 27, 2014
Time:	1:30 p.m.
Courtroom:	8, 4th Floor
Judge:	The Honorable Lucy H. Koh

NOTICE OF MOTION AND MOTION TO STRIKE THE IMPROPER REBUTTAL TESTIMONY IN DR. LEAMER'S REPLY EXPERT REPORT OR, IN THE ALTERNATIVE, FOR LEAVE TO SUBMIT A REPLY REPORT OF DR. STIROH

PLEASE TAKE NOTICE that on March 20, 2014 at 1:30 p.m. and/or March 27, 2014 at 1:30 p.m., or as soon thereafter as this matter may be heard in Courtroom 8, 4th Floor, of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California, before the Honorable Lucy H. Koh, Defendants Adobe Systems, Inc., Apple Inc., Google Inc., and Intel Corp. ("Defendants") shall and do hereby move this Court for an order striking portions of Dr. Leamer's expert reply report as improper rebuttal or, in the alternative, for leave to submit a reply report from their expert, Dr. Stiroh, pursuant to Federal Rules of Civil Procedure 26 and 37. This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Declaration of Christina Brown and exhibits thereto, any Reply Memorandum, the pleadings and files in this action, such arguments and authorities as may be presented at or before the hearing, and such other matters as the Court may consider.

Dated: January 9, 2014

By: /s/ George A. Riley
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After submitting a 21-page opening merits report, Plaintiffs' impact and damages expert, Edward E. Leamer, Ph.D., submitted a 78-page "reply" report, nearly four times as long as his opening report. It contains new arguments, analyses, and exhibits never seen in his five prior expert reports. This new material relates to issues that have been in this case since the outset and on which Plaintiffs bear the burden of proof. Dr. Leamer's reply report does not comply with the Federal Rules governing expert reports or with the parties' agreement and this Court's direction that reply reports must be "limited to true rebuttal and should be very brief." Dr. Leamer's new opinions should be stricken and he should be precluded from testifying to them at trial.

Dr. Leamer's reply report contains several areas that do not constitute true rebuttal. First, throughout this case, Dr. Leamer has reported and discussed his results using traditional thresholds of statistical significance. For example, he previously evaluated results at standard statistical significance thresholds of 1%, 5%, and 10%, meaning that the results are deemed statistically significant if they had a one, five, or ten percent probability (or less) of occurring by chance. In his reply report, however, Dr. Leamer proposes for the first time that his regression model be evaluated under a new *50% threshold* of statistical significance, meaning that the model's results are deemed statistically significant even if they have a 50% probability of occurring by chance (*i.e.*, including where the result is wrong). To justify this startling new test for statistical significance, he offers for the first time in this case an analysis of "Type I" and "Type II" statistical errors. Dr. Leamer's attempt to present and justify a new significance threshold in his reply report is improper and deprives Defendants of a fair opportunity to respond.

Second, Dr. Leamer includes new arguments in support of his model's "total new hires" variable. Dr. Leamer included this control variable, on which his impact and damages results depend, in every version of his regression model since his first report. By waiting until his reply to address this critical variable, Dr. Leamer seeks to foreclose any response by Defendants.

Third, Dr. Leamer introduces new arguments to justify his use of real compensation rather than nominal compensation, which is a major component of his damages estimation. All of

this new material should have been included in Dr. Leamer's opening report.

Plaintiffs cannot salvage this new material by contending that Dr. Leamer's reply report merely responds to Defendants' expert Dr. Stiroh's rebuttal expert report. The new analysis and arguments in Dr. Leamer's reply are in no way "intended solely to contradict or rebut evidence on the same subject matter identified by" Defendants' experts. Fed. R. Civ. P. 26(a)(2)(D)(ii). Dr. Stiroh applied the same standards of statistical significance relied on in Dr. Leamer's prior reports, and Dr. Stiroh never mentioned Type I and Type II statistical errors. Likewise, Dr. Leamer's new justifications for his new hires variable and nominal compensation metric "constitute[] an improper attempt to correct the weaknesses and improprieties of his original reports." *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 879 (S.D. Ohio 2010); *see Home Design Servs., Inc. v. Hibiscus Homes of Fla., Inc.*, No. 603CV1860, 2005 WL 2465020, at *5 (M.D. Fla. Oct. 6, 2005) (excluding expert testimony as untimely disclosed and not falling into exception for rebuttal testimony where it merely "casts doubt on an opposing expert's report").

The Federal Rules are clear that Plaintiffs cannot sandbag Defendants with new information and analysis that should have been included in Dr. Leamer's opening report. *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561, 2011 WL 5572835, at *3 (N.D. Cal. Nov. 15, 2011) (noting expert disclosure schedule "was designed to forestall 'sandbagging' by a party with the burden of proof who wishes to save its best points for reply, when it will have the last word, a common litigation tactic"); *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 159 (S.D. Ind. 2009) (noting that the Rules "do[] not give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report"). Dr. Leamer was bound to include in his opening report every opinion he would offer at trial, as well as all facts and data supporting his opinions and all exhibits summarizing them. Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii). He did not. Therefore, his new arguments and analyses should be struck. *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. at 160. Alternatively, the Court should grant Defendants leave to submit a reply expert report from Dr. Stiroh addressing these points.

II. BACKGROUND

On May 15, 2013, this Court issued a Case Management Order (Dkt. 421) that, *inter alia*, set the deadlines for the parties to submit their expert reports. Under that Order, initial merits expert reports were due October 28, 2013, rebuttal expert reports were due November 25, 2013, and reply expert reports were due December 11, 2013. (*Id.*) The Order does not provide for expert surreply reports. The parties agreed that Plaintiffs would submit the initial reports, Defendants the rebuttal reports, and Plaintiffs any reply reports. (Declaration of Christina Brown ("Brown Decl."), Ex. 1 (Mar. 13, 2013 e-mail).) The parties further agreed and the Court ordered that reply expert reports would be limited to "true rebuttal and should be very brief" and that they "should not add new material that should have been placed in the opening report." (*Id.*) This agreement is consistent with the Court's direction, in the context of class certification, that any expert reply "really needs to be true rebuttal, and not introducing brand new theories that should have been raised in the opening." (*Id.* Ex. 2 (Apr. 8, 2013 Hr. Tr. at 19:6-9).) Dr. Leamer previously filed four expert reports at the class certification stage, on October 1, 2012, December 10, 2012, May 10, 2013, and July 12, 2013. (Brown Decl. ¶ 2.)

On October 28, 2013, Plaintiffs submitted Dr. Leamer's 21-page Initial Merits Expert Report. (*Id.* Ex. 6 (Leamer Initial Report).) On November 25, 2013, Defendants submitted the Rebuttal Expert Report of Lauren Stiroh, Ph.D. ("Dr. Stiroh"), which addressed the issues of impact and damages. (*Id.* Ex. 7 (Stiroh Rebuttal Report).) A little over two weeks later, on December 11, 2013, Plaintiffs submitted Dr. Leamer's Reply Report. (*Id.* Ex. 8 (Leamer Reply Report).) It is seventy-eight pages long—nearly four times as long as his Initial Report. The Report includes twenty (20) figures, eleven (11) tables, eleven (11) exhibits, and complex and extensive analyses and regression results. Dr. Leamer's Reply Report also contains a number of new arguments, analyses, and exhibits on issues that have been in this case since the outset and on which Plaintiffs bear the burden of proof.

First, Dr. Leamer's Reply Report contains an analysis of the statistical significance of his results that is completely new and contradicts his earlier analyses and statements. (*Id.* ¶¶ 75-90 & Figs. 15-16.) In each of his prior reports, Dr. Leamer has consistently analyzed statistical

significance at the standard 1%, 5% and 10% thresholds. Dr. Stiroh similarly addressed statistical significance only at the 1%, 5%, and 10% thresholds in her rebuttal report, and made no suggestion that these thresholds were inappropriate. But in his Reply Report, Dr. Leamer for the first time introduces a 50% threshold for determining the statistical significance of his models and uses it to conduct entirely new statistical analyses.[1] (*Id.* ¶¶ 80-90 & Figs. 15-16.) As explained in Defendants' *Daubert* motion, this 50% threshold is dramatically different from the ones Dr. Leamer previously relied on.

Having introduced a new threshold of statistical significance that has no support in his prior work (or in the statistical literature), he attempts in his Reply Report to justify the threshold by identifying "Type I" and "Type II" statistical errors— terms and concepts never previously used in his reports. (*Id.* ¶ 83.) A Type I error in this case would be a finding of class-wide impact and damages when there were none. A Type II error in this case would be a finding of no class-wide impact and damages when in fact there was class-wide impact or damage. Dr. Leamer then offers an extensive, new analysis of the relationship between these types of errors in an attempt to defend his newly adopted 50% level of statistical significance. (*Id.* ¶¶ 84-90 & Figs. 15-16.) Although he had consistently reported statistical significance at the standard thresholds and had previously acknowledged that his results were not statistically significant at those thresholds, he did not even offer, and attempt to defend, his new threshold until his Reply Report.

This is hardly a new issue for Dr. Leamer. Its genesis was Dr. Murphy's criticism at class certification that Dr. Leamer failed to "cluster" the standard errors in his regression model, and that when they were clustered the results were not statistically significant. Dr. Leamer at first dismissed that criticism, but has now conceded it "has validity." (Brown Decl. Ex. 1 (Leamer Initial Report) at 12.) Back in April, the Court "encouraged" Dr. Leamer to take steps to address the clustering, and resulting significance, problem. April 5, 2013 Class Cert. Order (Dkt. No. 382) at 42-43 n.15. Dr. Leamer subsequently submitted two more class reports and an

[1] As explained in Defendants' *Daubert* motion to strike Dr. Leamer's testimony filed concurrently herewith, Joint Motion to Exclude the Expert Testimony of Edward E. Leamer, Ph.D., at 4-11, a significance level of 50% means there is a 50% probability of finding class-wide impact and damages when there were none, which amounts to a statistical coin flip.

opening merits report. He did nothing about the clustering and significance problem until his most recent Reply Report.

Second, Dr. Leamer for the first time offers new arguments and analyses in support of his "total new hires" variable, including the assertion that it should be included in the model because it is the "most statistically significant variable" and omitting it would "wreak havoc" on the other coefficients in his model. (Brown Decl. Ex. 8 (Leamer Reply Report) ¶¶ 115-120 & Figs. 17-18.) Dr. Leamer has never stated this opinion in any of his prior reports, even though he has used the total new hires variable in his model since his very first report at the class certification stage on October 1, 2012. Finally, Dr. Leamer's Reply Report introduces for the first time a justification for using real compensation as a metric in his model instead of nominal compensation. (*Id.* ¶¶ 108-110.)

Defendants sent Plaintiffs a letter by e-mail on December 23, 2013, explaining why portions of Dr. Leamer's Reply Report constituted improper rebuttal and seeking Plaintiffs' agreement to allow Dr. Stiroh to respond to Dr. Leamer's arguments at trial and submit a reply report addressing the new issues raised in Dr. Leamer's Reply. (Brown Decl. ¶ 3.) The parties met and conferred by telephone on December 26, 2013. (*Id.* ¶ 4.) At Plaintiffs' request, on December 28, 2013, Defendants sent Plaintiffs a proposed draft of Dr. Stiroh's reply report responding to Dr. Leamer's reply report. (*Id.* ¶ 5.) On January 3, 2014, Plaintiffs informed Defendants that they would not agree to permit Dr. Stiroh to submit a reply report addressing the new issues raised by Dr. Leamer. (*Id.* ¶ 6.) Although Defendants deposed Dr. Leamer on December 19, 2013 and questioned him regarding his opinions, Defendants are unable to serve a reply responding to these opinions under the existing Case Management Order.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 26 sets forth specific requirements for expert disclosures, in order to eliminate "any vestiges of the 'sporting' or 'fox-hunt' theory of litigation." *Aircraft Gear Corp. v. Kaman Aerospace Corp.*, No. 93 C 1220, 1995 WL 571431, at *1 (N.D. Ill. Sept. 25, 1995). Rule 26(a)(2)(B) provides that an expert witness's opening report must contain "a complete statement of all opinions the witness will express and the basis and reasons for them"

together with "the facts or data considered by the witness in forming them" and "any exhibits that will be used to summarize or support them." Fed. R. Civ. P. 26(a)(2)(B)(i)-(iii). Rebuttal disclosures of expert testimony must be "intended solely to contradict or rebut evidence on the same subject matter identified by another party" in its expert disclosures. Fed. R. Civ. P. 26(a)(2)(D)(ii).

"Rule 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This rule *requires* the exclusion of untimely expert witness testimony, unless the "part[y's] failure to disclose the required information is substantially justified or harmless." *Id.* The party facing the sanction carries the burden of demonstrating that the failure to comply with rules concerning expert testimony is substantially justified or harmless. *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008); *see also Yeti by Molly*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). Courts may impose additional sanctions for improper failures of disclosure, including striking the information. Fed. R. Civ. P. 37(b)(2)(A)(iii), (c)(1)(C).

IV. ARGUMENT

A. The New Opinions and Analyses in Dr. Leamer's Reply Report Are Improper Rebuttal Testimony and Should Be Stricken.

1. Dr. Leamer Presents an Entirely New Threshold of Statistical Significance and Discusses Type I and Type II Statistical Errors for the First Time.

Section V.D. of Dr. Leamer's reply report should be stricken in its entirety as untimely and improperly disclosed. In Section V.D., Dr. Leamer introduces for the first time his 50% threshold for determining statistical significance. This marks a fundamental change in his opinions in this case. In his previous reports, Dr. Leamer reported and analyzed results at the 1%, 5% and 10% significance thresholds. (*See, e.g.*, Brown Decl. Ex. 3 (Oct. 2012 Report) Figs. 20 & 23; Ex. 4 (Dec. 2012 Report) Figs. 12, 14 & 16-19; Ex. 5 (May 2013 Report) Figs. 4-5 & 8; Ex. 6 (Leamer Initial Report) Figs. 2-6.) He relied on the fact that some of his results were, and some

of Defendants' were not, statistically significant at these thresholds. Accordingly, in her Rebuttal Report, Dr. Stiroh used these same thresholds to point out, as Dr. Murphy had nearly a year earlier, that Dr. Leamer's results did not meet them.

In his Reply Report, Dr. Leamer breaks with his consistent pattern of reporting and relying on standard thresholds of statistical significance to advance his novel 50% threshold. In an attempt to justify this fundamental change, Dr. Leamer also introduces the concept of Type I and Type II statistical errors and offers new analyses of the relationship of these errors in his model. In none of his previous reports had Dr. Leamer discussed these concepts, even though he consistently reported statistical significance using standard thresholds. That remained true even after the Court "encouraged" Dr. Leamer to provide greater support for his results, given the clustering problem. Plaintiffs cannot sandbag Defendants with these novel opinions for the first time in a reply report, particularly given the intervening three reports in which he chose to remain silent. *Oracle Am., Inc.*, 2011 WL 5572835, at *3.

Plaintiffs cannot avoid the prohibition on submitting new material in a reply report by contending that Dr. Leamer is merely rebutting Dr. Stiroh's analysis. Under the plain language of Rule 26, Dr. Leamer's Reply Report must be limited to the subjects addressed by Defendants' expert rebuttal reports. Fed. R. Civ. P. 26(a)(2)(D)(ii) (rebuttal must be "intended solely to contradict or rebut evidence on the same subject matter identified by another party" in its disclosures); *see, e.g.*, *Gilbane Bldg. Co. v. Downers Grove Cmty. High Sch.*, No. 02 C 2260, 2005 WL 838679, at *11 (N.D. Ill. Apr. 5, 2005) ("Because the [plaintiffs'] CCL Report goes far beyond rebutting the opinions expressed in [defendant's] expert report, the [plaintiffs'] CCL Report is not a rebuttal report."). And as this Court previously explained, Plaintiffs' rebuttal report "really needs to be true rebuttal, and not introducing brand new theories that should have been raised in the opening." (Brown Decl. Ex. 2 (Apr. 8, 2013 Hearing Tr. at 19:6-9).)

Dr. Leamer never mentioned Type I or Type II errors in his prior reports, notwithstanding his notice of this issue and the Court's encouragement to address it, and he concedes that "Dr. Stiroh never mentions Type II error in her report." (Brown Decl. Ex. 8 (Leamer Reply Report) ¶ 85.) Yet Dr. Leamer devotes an entire section of his Reply Report to criticizing this

"shortfall" in Dr. Stiroh's Rebuttal Report and presenting completely new analyses and opinions addressing Type I and Type II errors to justify his 50% significance level. (*Id.* ¶¶ 75-90 & Figs. 15-16.) Similarly, Dr. Leamer attacks Dr. Stiroh's use of a 5% significance level, but Dr. Leamer's own Initial Report and the four reports he submitted in the class certification proceedings all use a significance level of 5% as well. It would be one thing if Dr. Leamer preferred and used the 10% significance level he has also reported and relied on, but his new 50% significance level is a new and dramatic departure, and it is far too late. In Section V.D, Dr. Leamer is not "rebutting" anything that Dr. Stiroh said about his prior analysis. Instead, Dr. Leamer is providing entirely new analysis and opinions. The Federal Rules and this Court's prior guidance prohibit such gamesmanship.

If Section V.D. is allowed to stand, Dr. Leamer's new opinions would not be subject to a direct response from any opposing expert as expert discovery has now closed. "This immunity, combined with the element of surprise, would be unfair." *Oracle Am., Inc.*, 2011 WL 5572835, at *3. Section V.D. should accordingly be stricken from Dr. Leamer's Reply Report and Dr. Leamer should be forbidden from testifying at trial to the opinions expressed therein.

2. Dr. Leamer Presents New Arguments in Support of His "Total New Hires" Variable and Use of Real Compensation.

Dr. Leamer also includes for the first time in his Reply Report entirely new arguments and justifications for two aspects of his model. First, Dr. Leamer opines that his total new hires variable is the "most statistically significant variable" and omitting it would "wreak havoc" on the other coefficients in his model. (Brown Decl. Ex. 8 (Leamer Reply Report) ¶¶ 115-117.) He also provides new analyses aimed at justifying the variable's inclusion in his model. (*Id.* ¶¶ 118-120 & Figs. 17-18.) Dr. Leamer has included this total new hires variable, which drives his damages results, in each version of his regression model since his first report in October 2012. Yet he has never, in any of those prior reports, offered his opinion that it is the "most statistically significant" variable or that it is necessary to preserve the coefficients on the other variables in the model. By offering his new justifications and analyses, Dr. Leamer merely provides "a new means to support [his] original opinion" and this analysis is therefore also properly stricken as improper rebuttal.

Daly v. Far E. Shipping Co., 238 F. Supp. 2d 1231, 1240-41 (W.D. Wash. 2003), *aff'd*, *Daly v. Fesco Agencies NA Inc.*, 108 F. App'x 476, 479-80 (9th Cir. 2004); *see Home Design*, 2005 WL 2465020, at *5 (expert testimony is not proper rebuttal where it merely "casts doubt on an opposing expert's report").

Second, Dr. Leamer's Reply Report introduces for the first time a justification for using real compensation as a metric in his model instead of nominal compensation. (Brown Decl. Ex. 8 (Leamer Reply Report) ¶¶ 108-110.) In each of his five prior reports, Dr. Leamer failed to provide any opinion or explanation as to why he believed real compensation rather than nominal compensation was the appropriate metric. Now that Dr. Stiroh has called this choice into question, Dr. Leamer improperly "attempt[s] to correct the weaknesses and improprieties of his initial report" and state for the first time the reasons underlying his decision. *Baker*, 680 F. Supp. 2d at 879. The time to do so was in his Initial Report, not in a Reply Report.

B. In the Alternative, Defendants Should Be Granted Leave to Submit a Reply Report from Dr. Stiroh Addressing the New Points Raised in Dr. Leamer's Reply Report.

In the alternative, if the Court is not inclined to strike Dr. Leamer's Reply Report, the Court should grant Defendants leave to submit a reply expert report from Dr. Stiroh addressing the new opinions and analyses in Dr. Leamer's Reply, and to offer Dr. Stiroh's testimony on these issues at trial. As the Court's Case Management Order did not provide for the exchange of surreplies (Dkt. 421), Defendants must obtain leave from the Court before so doing. Fed. R. Civ. P. 26(e)(1)(B). This Court has "broad discretion" to "control the extent and timing of discovery." *Fox v. Cnty. of Tulare*, No. 11-CV-520, 2013 WL 5670873, at *6 (E.D. Cal. Oct. 16, 2013) (citation and internal quotation marks omitted); *see Hoffman v. Tonnemacher*, No. 04-CV-5714, 2006 WL 3457201 (E.D. Cal. Nov. 30, 2006) (exercising its discretion and allowing defendants to designate an additional rebuttal expert on retrial). To permit the new arguments and analyses in Dr. Leamer's Reply Report to stand without providing Defendants' an opportunity to respond would be unfair and prejudicial. *See Oracle Am., Inc.*, 2011 WL 5572835, at *3.

V. CONCLUSION

Dr. Leamer's Reply Report includes new opinions and analyses that should have been

disclosed in his Initial Report and constitute improper rebuttal testimony. The portions containing this new material, paragraphs 75-90, 108-110, and 115-120 and Figures 15-18, should be stricken from his Reply Report, and Dr. Leamer should be precluded from testifying to the opinions expressed therein. In the alternative, Defendants should be allowed the opportunity to respond to Dr. Leamer's new analyses at trial and to submit a reply report from Dr. Stiroh.

Dated: January 9, 2014

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ATTESTATION

Pursuant to General Order No. 45 X(B), I hereby attest that concurrence in the filing of this document has been obtained from each of the above-listed signatories.

By: /s/ George A. Riley
George A. Riley